IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1105

RAMSEY CLARK, *Appellant,*

v.

J. STANLEY KIMMITT,
Secretary of the United States Senate,

EDMUND L. HENSHAW, JR.,
Clerk of the United States House of Representatives,

and

FEDERAL ELECTION COMMISSION, *Appellees.*

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

APPELLEE HENSHAW'S MOTION TO DISMISS APPEAL AND BRIEF IN OPPOSITION TO CERTIORARI

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The appellee Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, hereby moves, pursuant to Rule 16(1)(a), to dismiss this appeal as not being "within the jurisdiction of this court, because not taken in conformity to statute." And if the jurisdictional statement then be treated as a petition for certiorari, pursuant to 28 U.S.C. § 2103, the appellee herewith files a brief in opposition to certiorari.

INTRODUCTORY STATEMENT

At the outset, the appellee Henshaw calls this Court's attention to an important development in this case, occuring after the decision of the Court of Appeals on January 21, 1977. It dramatically underscores the correctness of the decision below and further drains from the case any basis or need for this Court's review of that decision.

March 29, 1977, saw the termination of the 30-legislative-day period in which either House of Congress could have disapproved or "vetoed" the full set of rules and regulations proposed by the Federal Election Commission. No such disapproval or veto occurred during that period, thus allowing the Commission to "prescribe" and make effective its rules and regulations in accordance with the relevant provision of the Federal Election Campaign Act, 2 U.S.C. § 438(*c*) (2). To announce this fact, the Commission issued the following press release on April 5, 1977:

> The Federal Election Commission will act on Thursday (April 7) to officially prescribe comprehensive regulations implementing the Federal Election Campaign Act of 1971, as amended.
>
> The FEC scheduled a vote on official adoption of its formal regulations at its regular Thursday meeting following the completion last week of the 30 legislative day period required by the statute for Congressional review.
>
> The meeting will begin at 10:00 a.m. in the FEC fifth floor conference room.
>
> The regulations were submitted to Congress on Wednesday, January 12. The 30th legislative day, interpreted as a day when both the House and Senate are in session, occurred on Tuesday, March 29.

> No provision was disapproved by Congress.
>
> The regulations were also submitted to Congress last year, but Congress adjourned after only 28 legislative days had expired. Therefore, the Commission did not vote to formally prescribe the regulations last year. The text of the regulations is found in the August 25, 1976, Federal Register, pages 35932-35976.

QUESTIONS PRESENTED

1. Where an *en banc* court of appeals has declined, for reasons of unripeness and judicial prudence, to answer all certified questions as to the constitutionality of the "one-House veto" provision of the Federal Election Campaign Act (2 U.S.C. § 438(c)), can an appeal be taken under the section of the Act (2 U.S.C. § 437h (b)) that authorizes appeals to this Court from any decision of the court of appeals "on a matter certified" to it by a district court as to "the constitutionality of any provision of the Act"?

2. Where neither House of Congress has disapproved or vetoed regulations proposed by the Federal Election Commission and where no record has been established as to what the unicameral disapproval device means in practice, other than abstract analysis and speculation,

(a) Is a challenge to the constitutionality of the "one-House veto" device in the Federal Election Campaign Act (2 U.S.C. § 438(c)), as applied to such "non-vetoed" regulations, ripe for judicial determination?

(b) Does the doctrine of judicial prudence preclude a judicial determination in these circumstances?

(c) Do other doctrines of justiciability, such as the absence of standing or the presence of political ques-

tions, preclude a judicial determination in the circumstances of this case?

STATEMENT OF THE CASE

The relevance of the fact that there has been no disapproval or veto by either House of Congress of the Commission's comprehensive regulations is demonstrated by a chronological summary of the way in which this appeal developed. It is a summary that also demonstrates how the proper development of constitutional facts and constitutional issues can be forgotten in the rush to "expedite to the greatest possible extent" proceedings under the Federal Election Campaign Act, 2 U.S.C. § 437h. Cf. *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

July 1, 1976. Appellant filed this suit in the District Court, challenging the constitutionality of the "one-House veto" provisions of the three federal election laws.[1] The complaint sought to enjoin the appellees from "transmitting rules or regulations to any body of Congress" and to compel the appellee Commission "to prescribe rules and regulations upon their adoption by it." App. I, 21a-22a. But at this point, no rules or regulations had been adopted or proposed by the Commission or transmitted to Congress, much less disapproved or "vetoed" by either House of Congress. Nor did the complaint identify any particular proposed rule or regulation that affected or injured the appellant or to which any kind of objection was made.

[1] The constitutional challenge to the "one-House veto" provisions of the Federal Election Campaign Act, 2 U.S.C. § 438(c), was brought pursuant to § 437h in the District Court, which was required "immediately" to certify "all questions of constitutionality of this Act" to the Court of Appeals below, sitting *en banc*.

The appellant also challenged the "one-House veto" provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9009(c), and of the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9039(c). These Acts have been moved to and codified as Chapters 95 and 96, respectively, of Subtitle H of the Internal Revenue Code of 1954, as amended, and are frequently referred to as the "Subtitle H provisions." Procedurally, the first Act (in Chapter 95) calls for the convening of a three-judge court "to implement or construe any provision of this chapter," followed by a direct appeal to this Court. 26 U.S.C. §§ 9011(b). Appellant's challenge to the second Act (in Chapter 96) was brought under 28 U.S.C. § 2282 (now repealed), since the Act itself has no three-judge court provision.

August 3, 1976. The Commission's proposed comprehensive regulations, following their final adoption by the Commission on July 29 and 30, 1976, were transmitted to both the House and Senate to lie over a period of 30 legislative days.[2] If, during that period, any such rule or regulation were disapproved by either House of Congress, the Commission could not put the rule or regulation into effect.

August 13, 1976. The District Court made what it called a "critical determination" that it should not hear and decide any Article III justiciability issue (including questions as to ripeness), which the appellees had raised in their motions to dismiss, "but should instead certify them, along with the other constitutional questions in this case, to the Court of Appeals."

August 27, 1976. The District Court granted the contested motion of the "United States" to intervene as a party plaintiff, by permission pursuant to Rule 24(b)(2), Fed. Rules Civ. Proc., on behalf of "the entities represented by the United States, namely the

[2] For this purpose, a legislative day is defined as one on which both the House and the Senate are in session. See 2 U.S.C. § 438(c)(4).

President of the United States and the Executive Branch of the federal government."[3] The complaint of the United States, without specifying any particular proposed rule or regulation to which objection was made and without alleging that any "one-House veto" had occurred, sought only a declaration that the "one-House veto" provisions of the federal election statutes "be and are unconstitutional." App. I, 27a.

September 3, 1976. The District Court granted the motion of the appellant Clark, joined in by the "United States," to certify five "certain constitutional questions" that the appellant Clark and the "United States" had proposed. The first such question dealt with the justiciability of this action, while the other four concerned the constitutionality of the "one-House veto" provisions of the federal election statutes in question.[4] None of the parties had addressed to the District Court any arguments or contentions respecting the merits of the four certified "one-House veto" questions, particularly since the District Court had no jurisdiction to answer or resolve such constitutional questions. Moreover, since no legislative veto had been

[3] The District Court in effect denied the main attempt of the "United States" to intervene as of right under Civil Rule 24(a)(1), an attempt grounded on 28 U.S.C. § 2403. The appellees, particularly those representing the House and Senate, also protested that, since the real party in interest was the President, intervention should be in his name and not that of the "United States." All of the appellees, of course, are constituent parts of the "United States."

[4] These five certified questions are repeated as the five "Questions Presented" in appellant's jurisdictional statement before this Court, pp. 5-6. The District Court also certified findings of fact, stipulated to by the parties, in support of the certified questions respecting the "one-House veto."

exercised as to these regulations, the record established in the District Court could not explain or even address that non-existent fact.

September 3, 1976. Less than two hours following the transmission from the District Court of the certified questions, the Court of Appeals *en banc* issued the following order (App. I, 10a-11a):

> ". . . this matter is preliminarily deemed to have been properly certified to this court by the District Court pursuant to § 437h(a), and this court shall proceed to consider the instant matter *en banc*, in accord with precedent established by this Court in *Buckley* v. *Valeo*, 519 F.2d 817 and 519 F.2d 821 (1975), affirmed in part and reversed in part (on other grounds), 424 U.S. 1 (1976). It appearing to the court that plaintiff Clark is a participant in a party primary election for nomination as United States Senator from New York, which election is to be held on September 14, 1976, expedition is required, it is, therefore[5]
>
> "FURTHER ORDERED by the court that a hearing will be held on September 10, 1976 at 2:00 p.m. on the certification. *The parties having addressed these questions in their presentations to the District Court, such expedition should not be unduly burdensome*, and, it is therefore [emphasis added]
>
> "FURTHER ORDERED by the court that all briefs upon the matters to be argued on Friday, September 10th shall be filed no later than the close of business, Wednesday, September 8, 1976. . . ."

[5] It should be noted, however, that neither the appellant Clark nor any other party had ever requested expedition by reason of the imminence of this September 14 primary election. Indeed, almost simultaneously with the issuance of the Court of Appeals order, the appellant Clark was moving to establish an "expedited briefing schedule," under which the initial briefs of all parties would have been due in 30 days.

September 3, 1976. Upon the request of the District Court made on this day, the Chief Judge of the Court of Appeals designated the judges to serve as members of the three-judge court to hear and determine the challenges to the "one-House veto" provisions of Subtitle H of the Internal Revenue Code, 26 U.S.C. §§ 9009(c), 9039(c). Two of these designated judges were also to sit as members of the *en banc* Court of Appeals. Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 9-10, n. 6 ("we need not resolve the jurisdictional ambiguities that occasioned the joint sitting of the Court of Appeals and the three-judge court").

September 8, 1976. On this date, five days after entry of the foregoing order (including the Labor Day weekend), all parties filed their briefs "on the certification." The briefs of the appellant Clark and of the "United States" purported to cover both the justiciability question and the four questions relating to the constitutionality of the "one-House veto" provisions.[6] The appellees, however, read the foregoing order of the Court of Appeals as restricting the parties to those questions already "addressed . . . in their presentations to the District Court." They accordingly limited their briefs to the justiciability matters and the inter-

[6] The brief of the "United States," however, only discussed two of the four certified constitutional questions. It apparently found Questions 3 and 4 unworthy of argument. The brief did argue that the appellant's status as a voter gave him no standing to pursue this case, and that whether he had alleged "a distinct and palpable injury to himself." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), was a "novel and difficult issue" that need not be resolved since the intervening complaint of the "United States" raised a justiciable controversy. No position was taken as to Clark's standing in his capacity as a candidate (Brief, pp. 16-17), a status which was to disappear with Clark's defeat in the September 14 election.

vention matters that had already been "addressed . . . in their presentations to the District Court." No effort was made to brief, within this short five-day period, the complex constitutional questions that had only been put into final form by the District Court on September 3, 1976.

September 10, 1976. Oral argument was had before the *en banc* Court of Appeals, sitting together with the three-judge court. Unlike the opposing parties, the appellees made no effort to address the constitutional questions in their oral presentations.

October 1, 1976. The 94th Congress adjourned *sine die* on October 1, 1976, that being the 28th legislative day following the transmission of the Commission's proposed regulations on August 3, 1976. During that period, however, no resolution of disapproval had been introduced in either House and no vote of disapproval or "veto" was in fact taken. Immediately after adjournment, the Commission publicly announced that, although its regulations had not technically become effective, they would be used as "an authoritative guide" to application of the election laws. Thus the administration of those laws was in no way hampered by the congressional adjournment prior to the lapse of the 30-day period. App.II, 15, n.7.

January 12, 1977. The Commission transmitted to both Houses of the 95th Congress the identical rules and regulations that had been proposed and transmitted to the 94th Congress, and the 30-legislative-day period began running anew.

January 21, 1977. The *en banc* Court of Appeals, relying solely on grounds of ripeness and judicial prudence, determined that the certified questions should

be returned to the District Court "unanswered," with directions to dismiss the case. The court expressly reserved decision as to matters of standing and the political question doctrine. App. II, 10. Simultaneously, the three-judge court entered a judgment, in accordance with the Court of Appeals' judgment, that the action before it be dismissed and the three-judge court be dissolved.

February 7, 1977. The appellant Clark filed notices of appeal to this Court from the judgments of both the Court of Appeals and the three-judge court. At no time has the intervening "United States" noted any appeal or otherwise sought review of the judgments of these courts.

February 9, 1977. The appellant Clark, contrary to Rule 15(3), purported to docket both appeals in this Court by filing a single document labeled (1) a jurisdictional statement on appeals from both courts, and (2) a petition for writ of certiorari addressed to both courts. Thereafter, the appellant Clark voluntarily abandoned his appeal from the judgment of the three-judge court and limited the document filed in this Court to a jurisdictional statement on the appeal from the judgment of the *en banc* Court of Appeals.[7]

March 29, 1977. As previously indicated in the Introductory Statement, p. 2, *supra*, the 30-legislative-day period following the resubmission of the Commission's proposed rules and regulations expired on March 29, 1977. During that period, no resolution of dis-

[7] On March 28, 1977, some 65 days after the entry of the three-judge court's judgment on January 21, 1977, the appellant Clark filed what appears to be an out-of-time notice of appeal from that judgment to the Court of Appeals below.

approval was submitted to or voted on by either House. In the absence of such disapproval by either House, the Commission is now free to "prescribe" such rules and regulations in accordance with 2 U.S.C. § 438 (c)(2), which is precisely the ultimate affirmative relief that the appellant Clark has always sought.

STATUTORY PROVISIONS INVOLVED

Section 437h of Title 2, U.S.C., a part of the Federal Election Campaign Act of 1971, as amended, provides as follows:

> § *437h. Judicial review*
>
> (a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.
>
> (b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.
>
> (c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

MOTION TO DISMISS APPEAL

The motion of the appellee Henshaw to dismiss this appeal is bottomed on the fact that, in the words of Rule 16(1)(a), "the appeal is not within the jurisdiction of this court, because not taken in conformity to statute." The appeal, in short, has not been "taken in conformity to" 2 U.S.C. § 437h(b), which is the sole statutory authority for this appeal cited in the jurisdictional statement (p. 4).

Section 437h(b) permits an appeal to this Court only as to an *en banc* court of appeals' "decision on a matter certified under subsection (a)." And subsection (a) in turn permits certification only of "questions of constitutionality of this Act."

The critical fact here, however, is that the Court of Appeals expressly declined to render "any decision on a matter certified under subsection (a)," i.e., a matter relating to the "constitutionality of this Act." Instead, the court ruled that the matters "certified under subsection (a)" did not present "a ripe justiciable 'case or controversy' which would permit this court to reach and decide the merits of the [certified] constitutional questions respecting a unicameral veto of Commission regulations." App. II, p. 16. And the court further ruled, in footnote 10 (pp. 16-17) of the opinion, that even if there were a "case or controversy" it would "nevertheless refuse to reach the merits of the [certified question as to the] unicameral veto under the doctrine of judicial prudence." Accordingly, the Court of Appeals returned "the certified questions to the District Court unanswered, with instructions to dismiss." App. II, pp. 10, 16-18.

Such a refusal, on ripeness and prudential grounds, to answer certified questions as to the constitutionality

of the "one-House veto" provisions of the Federal Election Campaign Act simply is not an appealable determination under § 437h(b). That subsection (b) limits this Court's appeal jurisdiction to determinations respecting the constitutionality of some provision of the Act. It does not confer appeal jurisdiction over rulings as to ripeness and judicial prudence—matters entirely unrelated to the constitutionality of any provision "of this Act." Cf. *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90 (1974); *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975).[8]

Appellant's claim (J.S. 3) that the Court of Appeals, despite its return of all certified questions "unanswered," did in fact answer the first certified question—which asked whether this action presented "a justiciable case or controversy under Article III"—cannot save this appeal. There is a serious problem whether a question as to justiciability can be or should be certified under subsection (a), since it does not relate to the "constitutionality of this Act" and the appellees so argued below.[9] But that problem aside, subsection (b) plainly does not confer appeal jurisdiction on this

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[8] The *Gonzalez-MTM* doctrine, in defining what kinds of injunctive orders of three-judge courts are directly appealable to this Court under 28 U.S.C. § 1253, holds that an appeal lies "only where such order rests upon resolution of the merits of the constitutional claim presented below." 420 U.S. at 804. Pursuant to that doctrine, this Court has held that an order dismissing a complaint as being nonjusticiable is not appealable under § 1253. *Dickson* v. *Ford*, 419 U.S. 1085 (1974).

[9] Two questions dealing with justiciability were certified and answered by this Court in *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976). But the propriety of certifying such questions was not put in issue in that case. Moreover, there were answers given to other certified questions dealing with the constitutionality of provisions of the Act that were sufficient to sustain an appeal under § 437h(b).

Court to review a decision on a certified matter other than one certified under subsection (a) dealing with "the constitutionality of any provision of this Act." A certified question as to justiciability is not of that stripe.

On February 22, 1977, this Court denied appellant Clark's motion to expedite consideration of these appeal proceedings. The same reasons that justified denial of expedition require that this appeal be dismissed.[10]

BRIEF IN OPPOSITION TO CERTIORARI

This Court is directed by 28 U.S.C. § 2103, where an appeal has been "improvidently" taken from a court of appeals, to regard and act on the papers whereon the appeal was taken as a petition for writ of certiorari. In the event this Court finds that § 2103 is applicable in the circumstances of this defective appeal, the appellee Henshaw urges that certiorari be denied for the following reasons.

1. The Constitutionality of the "One-House Veto" Provisions of the Federal Election Campaign Act Is Not Properly in Issue Before This Court.

The appellant Clark has sought to confront this Court with at least four constitutional questions respecting the "one-House veto" provisions of the

[10] In 2 U.S.C. § 437h(c), Congress has made it the "duty" of this Court to "expedite to the greatest possible extent" the disposition "of any matter certified under subsection (a)." But since only questions as to the constitutionality of some provision of the Act can be certified under subsection (a) and since the Court of Appeals rendered no decision on such certified matters, the expedition command of § 437h(c) is inapplicable. Such was the precise objection made by the appellees in opposing the request for expedition before this Court.

Federal Election Campaign Act. He has done so by resubmitting as "Questions Presented" to this Court all the certified questions that the Court of Appeals declined to answer (J.S. 5-6).

Those constitutional questions are simply not properly in issue before this Court, for they were not addressed or answered by the court below. The fact that they were not answered below is what makes the appeal defective. And that fact also makes review of the merits of those constitutional questions by certiorari entirely inappropriate

In enacting the Federal Election Campaign Act, Congress did not intend to give this Court any kind of original jurisdiction to determine in the first instance questions of "the constitutionality of any provision of this Act." Those questions are to be answered first by the Court of Appeals, and then come to this Court by way of appeal. Congress obviously meant to have this Court review questions as to the constitutionality of this Act only with the assistance of an opinion below that properly addresses and explores the merits of such questions. Yet to grant certiorari to review the constitutional questions left unanswered by the Court of Appeals would indeed force this Court to address these questions in the first instance in violation of the statutory scheme of adjudication, and in violation of some of the fundamental precepts against hasty and unnecessary constitutional adjudication by this Court.

This Court has long warned that it will not "entertain constitutional questions in advance of the strictest necessity." *Parker* v. *County of Los Angeles*, 338 U.S. 327, 333 (1949). See also *Liverpool Steamship Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885);

Bowen v. *United States*, 422 U.S. 916, 920 (1975). This reluctance to decide the constitutional questions unnecessarily in turn is grounded in the constitutional role of the federal courts. *United States* v. *Raines*, 362 U.S. 17, 21 (1960). Such reluctance, moreover, is particularly strong where the constitutional questions involve the validity of an Act of Congress and where there are other questions that may be dispositive of the case. Here, where the lack of justiciability has been found dispositive, there is no "strictest necessity" that this Court leap to entertain a highly significant and complex constitutional argument that has not been fully developed or explored in the court below. This Court does not reach for "constitutional issues [that] come to us in highly abstract form." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 575 (1947).

Indeed, the court below in effect found that the constitutional debate that the appellant is so eager to embrace has to date been an "abstract analysis or speculation." App. II, 17, n.10. No adequate record of constitutional facts has been developed; and for a variety of reasons, including the court's own ambiguous order expediting the briefing and oral argument, there has been none of the robust and in-depth adversary confrontation that should precede major constitutional adjudication. Cf. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976); *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 211-213 (1934), and cases cited.[11]

[11] Appellant mistakenly asserts (J.S. 12) that the congressional appellees "declined to submit" briefs on the merits of the "one-House veto" issue in the court below, while later filing *amicus* briefs on that issue in two other cases, *McCorkle* v. *United States*, No. 76-1479 (C.A.4); *Atkins* v. *United States*, Nos. 41-76, 132-76, 357-76 (Ct. Cl.)

What appellant omits to say is that (1) the appellees' decision not to brief major constitutional questions, within 5 days after they had been formulated and certified, was dictated by a fair reading of the Court of Appeals order of September 3, 1976 (see p. 7, *supra*); (2) the congressional appellees were invited by the Court of Claims to file *amicus* briefs in the *Atkins* case after Government counsel conceded at oral argument that the "one-House veto" provision of the Salary Act was unconstitutional; (3) the Fourth Circuit requested copies of these *Atkins* briefs of the appellees at the end of the oral argument in *McCorkle;* and (4) the nature of the constitutional arguments advanced by the appellees in the Salary Act context is significantly different from what they would advance with respect to the "one-House veto" provision of the Federal Election Campaign Act. Cf. the congressional appellees' motions to dismiss or affirm in *Pressler* v. *Blumenthal*, now pending on appeal to this Court, No. 76-1005, another Salary Act case involving a challenge to the "one-House veto" provision (recently repealed) in that Act.

The overriding dictate against resolution by this Court of the "one-House veto" questions is that constitutional litigation can take place in this Court, or in any federal court, only in the context of an Article III case or controversy. Constitutional questions "must be presented in the context of a specific live grievance." *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). The decision below has made it clear that there is no such live grievance in this case, a grievance rendered even less live by the fact that no "one-House veto" has been or ever will be cast as to the comprehensive regulations in question. Unless and until that threshold determination is reversed—and there is no reason why it should be—there can be no assurance that this Court could do other than write an abstract advisory opinion on the volatile political subject of "one-House vetoes."

2. The Only Questions Properly Before This Court Concern the Justiciability of This Proceeding.

As demonstrated above, the "one-House veto" questions posed by the appellant are not proper candidates

for review by this Court. The only questions that appellant can bring here on certiorari relate to the matters reflected in the decision below, matters that are encompassed under the broad concepts of justiciability and Article III "case or controversy."

The appellant has posed the justiciability matters in the first of his "Questions Presented" (J.S. 5). He has done so rather inartistically, copying the one question left unanswered by the Court of Appeals that should never have been certified in the first place and then suggesting (J.S. 3) that the court really did decide this justiciability question.[12] Be that as it may, Question 1 does nothing more than bring before this Court the whole gamut of justiciability issues raised before or decided by the Court of Appeals—ripeness, judicial prudence, standing and political question doctrines—all of which this Court would have to address independently in any event. See *Roe* v. *Wade*, 410 U.S. 113, 125 (1973).

These are the issues on which this certiorari case must stand or fall. Certiorari jurisdiction does not depend on whether these issues were certified below or even whether they were all resolved below. What does

[12] The opinion below demonstrates why the justiciability question should never have been certified. Justiciability, of course, is a "threshold" problem in any case and in any court. As the opinion notes (App.II, 7-8, n.2), a District Judge requested to make certification under § 437h "should be free to dismiss for want of jurisdiction, or to permit that question to be decided by this court *en banc*." Obviously, if the District Court may decide justiciability questions, those questions are not properly certifiable. Certified questions, which under § 437h(a) relate only to the validity of provisions of the Act, can never be answered by the District Court. The threshold justiciability questions, in other words, may be decided by either the District Court or the Court of Appeals quite apart from, or as a prelude to, the certification.

matter is whether there is any reason for this Court to review this threshold problem "whether the case before us presents a 'case or controversy' within the meaning of Art. III of the Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 11 (1976).

That the appellant may believe that resolution of the "one-House veto" problem is important or necessary is not a relevant certiorari consideration. In the present mold of this case, only justiciability matters are in issue, matters that "involve the exercise of judicial restraint from unnecessary decision of constitutional issues." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). All that this Court can now determine is whether the lower court's exercise of that restraint needs any review by this Court.

3. No Conflict of Decisions or Important Question Arises Out of the Justiciability Ruling Below, Thus Warranting Denial of Certiorari.

The opinion belows rests upon two alternative facets of justiciability: (1) the unripeness of this controversy, App. II, 16, and (2) the doctrine of judicial prudence, App. 11, 16-17, n. 10. See also the concurring opinion of Judge Leventhal, App. II, 36-51.

The appellant has totally ignored the latter point as to judicial prudence. That doctrine, rooted in the discretion of the court applying it, permits the stay of judicial hands when a court determines that a declaration of constitutional or other rights would be imprudent in the circumstances of a given case, for such reasons as the absence of a "full-bodied record." *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 112-113 (1962); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434

(1948); *Public Service Commission* v. *Wyckoff Co.*, 344 U.S. 237 (1952).

There is no claim here, nor could there be, that the Court of Appeals has in any way perverted or misapplied or abused this discretionary doctrine of judicial prudence. The total absence of any "one-House veto" of the comprehensive regulations in question and the corresponding lack of any proper or full-bodied record of constitutional facts respecting the congressional invocation of this special type of veto power are fully supportive of the use of the judicial prudence doctrine in this case. Why should any court address the constitutional complexities of a widespread legislative device in the absence of a concrete instance of its use? Why should a court address those complexities without any record to assist the court in understanding what the "one-House veto" device means in practice?

The judicial prudence doctrine fully supports the decision below and drains away any need or justification for review thereof. As to the alternative basis for the decision below, the ripeness doctrine, the appellant has likewise asserted no valid reason why the determination should be reviewed. What he does suggest in this connection is either incorrect or irrelevant.

(1) The assertion (J.S. 17) that the decision below "is directly in conflict" with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), will not bear analysis. The "one-House veto" problem was found unripe in *Buckley* solely "[b]ecause of our holding that the manner of appointment of the members of the Commission precludes them from exercising the rulemaking powers in question." 424 U.S. at 140, n. 176. *Buckley* had no occasion to deal with the ripeness of a challenge to the "one-House

veto" provision as applied to rules and regulations submitted by a validly constituted Commission. Thus there can be no conflict between *Buckley* and the decision below as to ripeness, as more fully explained in Appendix A to the court's opinion below. App. II, 20-26.

(2) Appellant, seizing upon certain language in the opinion below concerning his "personal stake" in the "one-House veto" device and his alleged injuries as a voter and candidate (App. II, 11), seeks to elevate this language into a misconstruction of "the test of justiciability under Article III and *Buckley*" (J.S. 19). Such references in the opinion to appellant's standing and injury, however, were not designed to rationalize the express holding of the court that "on this record . . . his present claim is unripe"—a record that revealed the pervasive fact that no legislative veto had ever been exercised with respect to the proposed comprehensive regulations.

Moreover, the court's opinion expressly disavowed any notion that it was addressing or resolving any questions as to appellant's standing or as to any tests of justiciability other than ripeness and judicial prudence. Its disavowal could not have been clearer (App. II, 10):

> "While this case presents many novel and thorny jurisdictional questions under Article III, we believe we need not address those pertaining to standing or political question, because the unripeness of the action is so pervasive."

Thus appellant's asserted misconstruction of "the test of justiciability," related as it is to the issues of

standing and injury not determined by the court, must be disregarded.

(3) Appellant further asserts (J.S. 22) that Congress has somehow directed this Court to exercise the "full extent of its Article III jurisdiction to resolve disputes as to the constitutionality of the election laws" and therefore "the one-House veto issue is ripe for decision by this Court at this time." This contention is frivolous. The "full extent" of this Court's Article III jurisdiction does not include jurisdiction to decide unripe controversies, or to resolve disputes that are otherwise nonjusticiable within the meaning of Article III.

(4) Finally, the appellant mentions (J.S. 13) but does not distinguish this Court's decision in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). As the court below noted (App. II, 13), *Sibbach* "stands for the principle that a lying-over provision which delays the effectiveness of an otherwise valid rule or regulation in order to permit Congress to take negative action is not of itself unconstitutional." That is all that has ever happened in this case—two lying-over periods that finally resulted in the final promulgation of the regulations without any negative action by Congress. *Sibbach* thus controls this case up to the point where unripeness makes the whole case nonjusticiable.

In the longer view, the decision below is a careful and responsible application of certain justiciability doctrines to the unique facts of appellant's case. Certainly, the decision below stands as a healthy reminder to those who would challenge the well-established device of the "one-House veto" that constitutional questions "must be presented in the context of a specific

live grievance." *Golden* v. *Zwickler,* 394 U.S. 103, 110 (1969). No further review by this Court is necessary to make that point any clearer than it already is.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for lack of jurisdiction. Treating the appeal papers as a petition for a writ of certiorari, in accordance with § 2103, certiorari should be denied.

Respectfully submitted,

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